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No. 97-843

IN THE

Supreme Court of the United States

OCTOBER TERM, 1997

AURELIA DAVIS, as next friend of LASHONDA D.,
Petitioner,

v.

MONROE COUNTY BOARD OF EDUCATION, *et al.*,
Respondents.

On Petition for Writ of Certiorari to the United States Court of Appeals for the Eleventh Circuit

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SUPPLEMENTAL BRIEF

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TABLE OF AUTHORITIES

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1. The United States Court of Appeals for the Seventh Circuit recently decided a student-to-student sexual harassment case, *Doe v. University of Illinois*, Nos. 96-3511, 96-4148, 1998 WL 88341 (7th Cir. Mar. 3, 1998), which exacerbates the circuit splits identified in the Petition for Writ of Certiorari. The Seventh Circuit held that Title IX requires schools to take prompt and appropriate measures to remedy peer hostile environment sexual harassment of which they have actual knowledge and that Title VII principles are applicable to the analysis of such claims. With this decision, the division among the Circuits has become more pronounced. When Petitioner filed her reply brief on January 6, 1998, the Fourth Circuit had ruled that peer sexual harassment was actionable under Title IX; however, that court has since vacated the decision and reheard the case *en banc*. *See Brzonkala v. Virginia Polytechnic Inst. and State Univ.*, 132 F.3d 949 (4th Cir. 1997), *vacated and reh'g en banc granted*, No. 96-1814 (4th Cir. Feb. 5, 1998). The Seventh Circuit now joins

other courts in recognizing a cause of action for student-to-student harassment, but diverges from those decisions in key respects.

2. The Seventh Circuit has aligned itself with the Ninth Circuit in recognizing that peer hostile environment sexual harassment can violate Title IX. *See Oona, R.S. v. McCaffrey*, 122 F.3d 1207, 1210-11 (9th Cir. 1997) (holding that school officials had a well-established duty under Title IX to remedy student-to-student sexual harassment). In this regard, the court considered and rejected cases from the Fifth and Eleventh Circuits, including the decision below, which have held that peer sexual harassment is not cognizable under Title IX. *See Rowinsky v. Bryan Indep. Sch. Dist.*, 80 F.3d 1006 (5th Cir. 1996); *Davis v. Monroe County Bd. of Educ.*, 120 F.3d 1390 (11th Cir. 1997).

Characterizing *Rowinsky* as "fatal[ly] flaw[ed]," the Seventh Circuit observed that the decision "fundamentally misunderstands the nature of the claim that plaintiffs in this kind of case advance." *Doe*, 1998 WL 88341, at *9. The court noted that the Fifth Circuit assumed that the aggrieved parties in *Rowinsky* sought to hold the school liable for the actions of non-agents, misapprehending the fact that liability in peer harassment cases is based on a school's "own actions and inaction in the face of its knowledge that the harassment was occurring." *Id.* The court further observed that the Fifth Circuit's holding was based on a constricted reading of Title IX's proscription against sex discrimination that would allow schools to "ignore the more frequent complaints of sexual harassment from girls, while imposing only the minimal cost that such schools would be required likewise to ignore any complaints . . . from their male students," a result clearly at odds with Title IX's goals. *Id.*

The Seventh Circuit also repudiated the decision below, finding that it was based on the premise that Congress enacted Title IX solely pursuant to its authority under the Spending Clause. *Doe*, 1998 WL 88341, at *10. The Seventh Circuit held that Congress relied both on its

Spending Clause powers and its authority under Section 5 of the Fourteenth Amendment to enact Title IX. *Id.* at *6. The court explained that since "protecting Americans against 'invidious discrimination of any sort, including that on the basis of sex,' is a central function of the federal government," and since Title IX proscribes such discrimination, the statute was, in part, a proper exercise of Congress' authority under the Fourteenth Amendment. *Id.* (quoting *Cannon v. University of Chicago*, 441 U.S. 677, 678 (1979)). In this connection, the Seventh Circuit recognized that Congress may act pursuant to more than one source of power when passing a single piece of legislation.[1] *Id.* at *5.

In addition, the Seventh Circuit held that the Eleventh Circuit misconstrued the implications of characterizing Title IX as purely Spending Clause legislation. The court observed that the decision below "ignored" *Franklin v. Gwinnett County Public Schools*, 503 U.S. 60 (1992), in concluding that Congress failed to provide educational institutions with unambiguous notice of potential liability under Title IX for peer harassment. *Id.* at *10. Instead, the Seventh Circuit, relying on *Franklin*, held that failing to remedy known sexual harassment is intentional discrimination, and where intentional discrimination is involved, the notice requirement of Spending Clause legislation is not a concern. *See id.* More specifically, the court explained:

> If, as alleged, school and University officials knew about the harassment and intentionally failed, and indeed flatly refused in some instances, to take steps to address it, then the plea that the institution was

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[1] The court noted that there have been numerous instances where Congress has used more than one source of authority in enacting legislation, citing as example, *Fullilove v. Klutznick*, 448 U.S. 448, 473 (1980), *overruled on other grounds by Adarand Constructors, Inc. v. Pena*, 515 U.S. 200 (1995), in which the Supreme Court found that Congress used an "amalgam" of its powers when it enacted the "minority business enterprise" provision of the Public Works Employment Act of 1977. *Doe*, 1998 WL 88341, at *5.

not 'on notice' that such failure could subject it to Title IX liability rings hollow.

Id. at *11.

The Seventh Circuit also concluded that the court below read Title IX too narrowly and failed to consider the Department of Education's interpretation of the statute. The court reasoned that the statute's emphasis on "safeguarding" students and this Court's mandate that Title IX be construed expansively, *see North Haven Bd. of Educ. v. Bell*, 456 U.S. 512, 521 (1982), "certainly support[] the proposition that a school may be liable for refusing to act upon its responsibility to operate a program in which all persons are free from the kind of exclusion and discrimination the statute forbids." *Doe*, 1998 WL 88341, at *13.[2] The court also found that the Department of Education's interpretation of Title IX, as set forth in its sexual harassment policy guidance, "reflects longstanding OCR policy." *Id.* at *15. In this regard, the court criticized the Eleventh Circuit for giving insufficient consideration to the Department's views in analyzing the student-to-student sexual harassment case at issue. *Id.*

3. *Doe* also intensifies the split over the application of Title VII principles in determining school liability for hostile environment claims under Title IX. In holding, as a general matter, that Title VII principles should guide its determination of such matters, the Seventh Circuit joins the First, Second, Sixth, Eighth and Ninth Circuits on this issue and aligns itself against the Fifth and Eleventh Circuits.[3]

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[2] The court rejected the Eleventh Circuit's reading of *Pennhurst State School & Hospital v. Halderman*, 451 U.S. 1 (1981), noting that "Congress need not . . . spell out in advance every situation to which it wishes a statute to apply" and that "no party to the present case could seriously dispute that Title IX imposes obligations upon schools that receive federal funds to avoid discrimination on the basis of sex." *Doe*, 1998 WL 88341, at *12.

[3] *Compare Brown v. Hot, Sexy, and Safer Prods., Inc.*, 68 F.3d 525, 540 (1st Cir. 1995) (applying Title VII principles to analysis of Title IX claim), *Kracunas v. Iona College*, 119 F.3d 80, 86-88 (2d Cir. 1997) (same), *Doe v. Claiborne County*, 103 F.3d 495, 514-15 (6th Cir. 1996) (same), *Kinman v. Omaha Pub. Sch. Dist.*, 94 F.3d 463, 469 (8th Cir. 1996) (same), *and Oona*, 122 F.3d at 1210 (same), *with Davis*, 120 F.3d at 1400 n.13 (rejecting Title VII principles), *and Rowinsky*, 80 F.3d at 1016 (same).

The court held that Title VII precedent should inform the analysis of Title IX claims, observing that "there is no reason why students . . . should be afforded a lesser degree of protection against such 'hostile environment' discrimination than adult workers in the employment setting regulated by Title VII." *Doe*, 1998 WL 88341, at *13. By adopting an actual knowledge standard, however, the court diverged from other Circuits that would hold schools liable for failing to respond to harassment of which they should have known. *See, e.g., Oona*, 122 F.3d at 1209-10; *Brown v. Hot, Sexy and Safer Prods., Inc.*, 68 F.3d 525, 540 (1st Cir. 1995); *Murray v. New York Univ. College of Dentistry*, 57 F.3d 243, 249-50 (2d Cir. 1995). Thus, *Doe* further exacerbates the division among circuit courts regarding whether, and to what extent, Title VII principles should be imported into the Title IX setting.

CONCLUSION

For the reasons stated, the Petition for Writ of Certiorari should be granted.

Respectfully submitted,

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